SUPREME COURT OF KENTUCKY
DOCKET NO: 2013-SC-000108
COURT OF APPEALS CASE NO: 2011-CA-001436

MARY BANKER
AND BRYAN CASSIS — APPELLANTS/CROSS-APPELLEES

v.

UNIVERSITY OF LOUISVILLE
ATHLETIC ASSOCIATION, INC. — APPELLEE/CROSS-APPELLANT

* * * *

BRIEF FOR APPELLANTS/CROSS-APPELLEES

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for the Appellants/Cross-Appellees has been served via United States mail, postage prepaid, this the 10th day of April, 2014, upon the following: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Craig C. Dilger and Jeffrey A. Calabrese, Stoll Keenon Ogden PLLC. 2000 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202; and Hon. Charles L. Cunningham, Jefferson Circuit Court Judge, Division Four (4), Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202.

Counsel for Appellants/Cross-Appellees

I. INTRODUCTION

Mary Banker and Bryan Cassis appeal from the opinion of the Kentucky Court of Appeals that reversed the jury verdict and judgment of the Jefferson Circuit Court finding that the University of Louisville Athletic Association unlawfully retaliated against and discharged Banker in violation of K.R.S. 344.280.

II. STATEMENT CONCERNING ORAL ARGUMENT

Banker and Cassis desire oral argument in this case and state that oral argument would assist the Court in its analysis of the nuances of the trial evidence and the import of the proposed change in the law.

III. STATEMENT OF POINTS AND AUTHORITIES

III. STATEMENT OF THE CASE

Mary Banker was a two-time all-American track and field athlete, and she coached a collegiate National Title Championship track team prior to being recruited by ULAA. Before working for ULAA, Banker had never been fired from a coaching job. (Trial Video Transcript ("TR"), 9-14-10 at 9:54-58).

ULAA recruited Banker to be an Assistant track and field coach, and Banker chose ULAA over other collegiate programs that were interested in recruiting her. When Banker accepted the position at ULAA, she became the only female Assistant Coach amongst an otherwise all male coaching staff. (TR, 9-14-10 at 9:59-10:02; TR, 9-14-10 at 3:03-3:10).

Prior to her arrival at ULAA, the Executive Senior Associate Athletic Director Julie Hermann told Banker "off the record" that Head Coach Ron Mann did not mentor the female coaches the same way he mentored the male coaches, and that if it were up to Mann, he would hire only male Assistant Coaches. (TR, 9-14-10 at 10:13-14).

Banker began her employment on September 5, 2007. Upon her arrival, Banker experienced what she perceived to be inappropriate comments by the male Assistant Coaches and gender-related discriminatory treatment from Coach Mann. The male Assistant Coaches were calling the student-athletes "pussies," they were criticizing the student athletes by telling them that they "run like a girl," they asked the student-athletes if they had a "mangina" and they were calling the student-athletes "sallys" and telling them to "pull up their skirts." (TR, 9-14-10 at 10:05-06; 1:43-44).[1]

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[1] Banker testified that she was offended by the language, that it hindered her ability to be an effective female coach and that it was demeaning to the female student-atheletes. (TR, 9-14-10 at 10:07).

Banker was asked by Coach Mann to help his wife in the kitchen and do party decorations. When Banker asked Coach Mann why she was being asked to do these things, Mann told her that the previous female Assistant Coach Welty had done them. Banker was also asked to bake cookies and 'bat her eyes and flip her hair' to secure approval from the compliance office for recruiting visits. (TR, 9-14-10 at 10:09).

Banker first complained within the Athletic Department directly to Head Coach Mann about the circumstances she believed to be discriminatory, but Coach Mann did nothing to investigate Banker's initial complaints. Mann did not relay Banker's complaints to the University's Human Resource Department, which was a separate Human Resources Department outside of the Athletic Department run by Hermann. Mann also did not discipline or reprimand any of the male Assistant Coaches, and despite multiple complaints by Banker, Coach Mann ignored it and told Banker to handle it herself. (TR, 9-14-10 at 10:12-13).

On February 7, 2008, Banker met with Hermann at Toast restaurant for brunch. Banker complained to Hermann about the discriminatory treatment she was experiencing within the Athletic Department.[2] Immediately following the Toast lunch, Hermann drafted and sent an email to Banker stating as follows: "Thank you … We're lucky to have you …. You're a change agent … don't let their limitations take you out of the game … thank god you're here." (TR, 9-14-10 at 2:08-11; Plaintiff's Exhibit 9).[3]

On March 4, following the Toast lunch with Banker, Hermann confronted Assistant Coaches Jacoby and Cowper about Banker's complaints, but Hermann did not otherwise discipline or reprimand the coaches. (TR, 9-14-10 at 2:06-08). The Assistant Coaches thereafter starting 'glaring' at Banker, they interrogated her co-workers about 'who had told on them' and Assistant Coach Jacoby stopped talking to Banker altogether. (TR, 9-14-10 at 10:15-17).

On April 22, 2008, because her previous complaints *within* the Athletic Department had not been adequately addressed and because the discriminatory conduct continued, Banker went *outside of* Hermann's Athletic Department and lodged a formal complaint with the University's Human Resources Department. (TR, 9-14-10 at 10:17-18).

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[2] At trial, Hermann initially denied that Banker complained to her, but when confronted with her own previous deposition testimony, Hermann finally admitted that Banker 'may have' discussed her complaints at that meeting. (TR, 9-14-10 at 2:00-01).

[3] The substance of Hermann's email was substantially different from her trial testimony. At trial, Hermann testified that it was at the Toast lunch that she started having concerns about Banker and her continued employment. It is not surprising, therefore, that despite producing hundreds of less important documents, Hermann and ULAA never produced this important piece of evidence or offered any explanation as to why this document was not included in the document production. Had Banker herself not printed this email out from her own work computer before she left ULAA, this evidence would never have come to light.

Banker's complaint to the University's HR Department was made to Malinda Durbin and it was the first time that Banker complained to anyone outside of the Athletic Department. (TR, 9-14-10 at 10:17-18).

On April 30, 2008, Hermann was called into the University HR offices by Durbin to discuss Banker's complaint. Although it was normally the responsibility of Durbin and the University HR Department to conduct the investigation, Hermann decided on this occasion that she would take over the 'investigation' herself without further involvement by the University HR, which was contrary to standard University procedure. (TR, 9-14-10 at 2:13-14; 3:36-37).

Following the meeting with Durbin, Hermann called Banker into her office to discuss her HR Complaint. Hermann told Banker 'you should have come to me.' Herman also told Banker specifically that '**you should not have gone to HR**.' (TR, 9-14-10 at 10:19-20).

Hermann also told Banker 'I don't know how I'm going to restore trust in you amongst the staff now' and 'I don't know how you're going to work downstairs after this.' (TR, 9-14-10 at 10:19-20).

On May 15, 2008, Hermann and ULAA terminated Banker's employment. Mann called Banker into his office, told her only that "it was not a good fit," and that ULAA was not going to renew her Employment Contract. Mann did not give Banker *any reason* for her discharge other than that 'it was not a good fit.' Mann did not give Banker any job-performance reasons for her termination (TR, 9-14-10 at 10:20-21).

Banker had no idea that she was about to be fired when she walked into Mann's office. Banker had never been given a performance evaluation, and Banker had never been disciplined, reprimanded or given any work performance 'write-ups.' At the time of her termination, Banker had already made plans to be at ULAA for the upcoming season and she forewent seeking employment opportunities elsewhere. (TR, 9-14-10 at 10:20-22).

On May 16, 2008, the day following her discharge, Banker sent an email to Mann and Hermann stating as follows:

> [t]he timeline of letting me go simply does not add up. If our working together simply 'was not a good fit' as you stated yesterday, then why not let me know in the winter or early spring so I could find another job? With the timing of our meeting **there is no other conclusion but that I am being let go in retaliation for the recent investigation.**

(TR, 9-14-10 at 10:22-28, 2:25-28; Plaintiff's Exhibits 12 and 13; Defendant's Exhibit 3). Coach Mann did not respond to Banker's email. (TR, 9-14-10 at 3:29).

On May 16, 2008, Banker also informed Mann and Hermann as follows:

> I was then and still am shocked at our conversation yesterday. … it was confirmed that I would be here through next year after I received no notice before April 30th which is required under our contract. … I had told people that I would be here next year as our contract states, have a least into next year and have passed on looking for other opportunities … was given every indication under our contract that I would be here through next year.

(TR, 9-14-10 at 10:22-28, 2:25-28; Plaintiff's Exhibits 12 and 13; Defendant's Exhibit 3).

At the time of her discharge, Banker's annual salary was Thirty-Seven Thousand Five-Hundred Dollars ($37,500). In addition to her salary, Banker's compensation included the standard ULAA employee fringe benefit package available to all ULAA employees, which included health insurance and free sporting event tickets. (Plaintiff's Exhibit 4; Banker-ULAA Employment Contract, ¶¶'s 1(a) and (c); TR, 9-15-10 at 12:03-04).

Following her discharge on May 15, 2008, Banker suffered extreme emotional distress as a result of losing her job. She became depressed, she lost weight and she couldn't eat or sleep. She was embarrassed that she had been fired and she was unable to continue sending money home to assist her mother. Because she had lost her income, she was also unable to afford Cobra health insurance coverage. Because she lost her health insurance coverage when she lost her job, Banker was unable to afford medical treatment or formal counseling. (TR, 9-14-10 at 10:27-28).

During the trial, Hermann and Mann claimed that a secret decision to discharge Banker had actually been made on April 16, 2008, *prior to* Banker's April 22nd HR Complaint. Neither the jury nor anyone who was present at the trial believed Coach's Mann's testimony regarding this April 16th decision to discharge Banker, of which there was no proof or other evidence. Moreover, ULAA's own email documentation disproved the testimony on this issue. In an email dated May 6, 2008, Hermann wrote that the Banker situation "will *likely* result in a non-renewal," and that Hermann "would *recommend* that Ron proceed" with terminating Banker's employment. (TR, 9-15-10 at 11:59-12:01).

In her email dated May 7, 2008, Hermann wrote that "we will proceed to not renew *as early as today*." Hermann's May 7th email also stated that "her grievance will not affect *whatever her current or ongoing employment status is*." (TR, 9-15-10 at 12:01-03). When asked if she had any documentation evidencing the claimed April 16th discharge meeting with Mann, Hermann testified "no, sir, other than the notations in Ron's planner and my planner." ULAA never produced any such notations, documents or planners from either Mann or Hermann. (TR, 9-15-10 at 12:01-03).

Following the trial and nearly a year of post-trial motions, the trial court issued six (6) separate Opinions and Orders and lengthy and detailed rulings and legal analysis on all of the same issues and arguments presented in this appeal.

With respect to ULAA's argument that there was insufficient evidence of the retaliation and pretext, the trial court considered and rejected that argument, holding as follows:

> **Sufficient facts also emerged at trial to create the inference that ULAA's non-discriminatory reason for termination was a pretext for retaliation**. In additional to the relatively strong temporal proximity between the complaint and termination, delegation of the investigation of the Plaintiff's human resources complaint to Julie Hermann raises the inference that its conclusion was predetermined.

(Trial Court, Opinion and Order entered July 12, 2011, p. 4; Appendix B).

In denying ULAA's motion for judgment notwithstanding the verdict, the trial court stated as follows:

> ULAA ignores the possibility that **a jury considered the testimony and evidence presented over the course of the trial and determined that ULAA's versions of events was untrue**, or at least not as believable as ULAA contends.

The jury instructions also included a specific finding that that Banker complained 'in good faith' about what she perceived to be gender-discrimination and that her complaints were in fact a motivating factor in her discharge. The jury simply did not believe the reasons given by the ULAA trial witnesses for Banker's discharge. The jury awarded Banker lost wages and emotional distress damages, and the Court made a prevailing party attorney fee award to Banker's attorney.

On appeal, the Court of Appeals issued an inexplicable ruling that set aside the entirety of the jury award and the attorney fee award and even directed that the entire case be thrown out with no further proceedings. The Court of Appeals' decision purposefully ignored the entirety of the evidence of record that supported *Banker's* position and the jury award, and instead, selectively picked out and premised its ruling on random portions of the evidence that supported *ULAA's* position.

The Court of Appeals ruling also mistakenly found that ULAA had begun discussions about terminating Banker's employment on April 16th, *prior to* Banker engaging in any protected activity. That finding was incorrect. In addition to the formal HR complaint Banker eventually lodged outside of the ULAA Athletic Department (because her informal complaints within the Department were being ignored), Banker made a series of less formal but still legally protected complaints of gender discrimination to her supervisors within the Athletic Department *prior to* April 16th.

Prior to February 7, 2008, Banker first complained to Head Coach Mann about what she believed to be gender-discrimination, but Coach Mann did nothing to put a stop to it. Mann did not conduct any investigation into Banker's initial complaints, he did not relay the complaints to Hermann or to the ULAA HR Department. Mann also did not discipline or reprimand any of the male Assistant Coaches. Instead, and despite 'multiple' complaints by Banker, Coach Mann ignored it and told Banker to handle it herself. (TR, 9-14-10 at 10:12-13).

On February 7, 2008, Banker met with Hermann at Toast restaurant for brunch. Banker reiterated her gender-discrimination complaints to Hermann. Also on February 7, 2008, immediately after the Toast lunch, Hermann drafted and sent an email to Banker stating as follows: "Thank you … We're lucky to have you …. You're a change agent … don't let their limitations take you out of the game … thank god you're here." (TR, 9-14-10 at 2:08-11; Plaintiff's Exhibit 9).

The Court of Appeals either didn't fully review the record or simply neglected to mention that Banker had made informal discrimination complaints and engaged in legally protected activity well prior to April 16th. But in any event, the Court of Appeals reached the erroneous conclusion that Banker did not establish any direct proof that her discharge was caused or motivated by her complaints of discrimination, and that Banker did not present any proof that the legitimate reasons articulated by ULAA did not motivate its decision to terminate her contract.

IV. ARGUMENT

A. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE JUDGMENT OF THE TRIAL COURT SHOULD BE REINSTATED.

If the decision of the Court of Appeals is not reversed, the new legal standards will be as follows: (1) trial courts in Kentucky must dismiss retaliation and wrongful discharge cases where the employer states *any* performance-based reason for firing the employee, regardless of how unbelievable or lacking in credibility the employer's reasons appear to be, and (2) trial courts cannot submit wrongful discharge/retaliation claims to a jury unless the employee can *prove* that she was retaliated against and also *disprove* every reason that the employer gives for discharging her.

Prior to this decision, the long established law has been that it is a violation of the retaliation statute if the employee's discrimination complaint was 'a substantial motivating factor' in the discharge. First Property Management Corp. v. Zarebidaki, Ky., 867 S.W.2d 185 (1993)(holding that employers "are not free from liability simply because they offer proof they would have discharged [the employee] anyway, even absent the lawfully impermissible reason, so long as the jury believes the impermissible reason did in fact contribute to the discharge as one of the substantial motivating factors.") *Id.* at 188-89.

Now, however, the Court of Appeals has moved the bar far to the right, holding that even if it is proven to, and decided by, a jury that the protected activity was in fact a substantial motivating factor in the employee's discharge, it is nevertheless not unlawful retaliation where the employer also articulates any nondiscriminatory reason for the discharge. In effect, the Court of Appeals' decision now makes it *legal* in Kentucky to retaliate against an employee for complaining about discrimination so long as the employer states that there were also performance based reasons for the discharge.

Because these new legal standards run blatantly contrary to the provisions of KRS 344.280 and existing Kentucky case law, and will effectively operate as a new and impossible bar to employees attempting to prove unlawful retaliation, the decision of the Court of Appeals should be reversed.

Contrary to the findings of the Court of Appeals, the actual facts and evidence of record demonstrate that this was not a case in which an employee made a complaint to afford herself job protection; it was exactly the opposite; it wasn't until after the employee started engaging in legally protected activity that the employer claimed to have had silent criticisms of her job performance which were never communicated to the employee either before or after her discharge.

The following facts and evidence demonstrated that Banker presented legally adequate proof of causation and that the ULAA reasons were pretextual.

Immediately following Banker's formal HR complaint, the ULAA Senior Associate Athletic Director Hermann called Banker into her office and flat-out told her "you should not have gone to HR." (TR, 9-14-10 at 10:19-20). Hermann also told Banker "I don't know how I'm going to restore trust in you amongst the staff now," and "I don't know how you're going to work downstairs after this." (TR, 9-14-10 at 10:19-20).

Three weeks later, on May 15, 2008, Hermann and ULAA fired Banker and told her only that "it was not a good fit." ULAA did not give Banker *any reason for her discharge* other than that 'it was not a good fit.' Mann never gave Banker any job-performance reasons for her termination (TR, 9-14-10 at 10:20-21). Banker did not learn of ULAA's claimed performance-based reasons for her termination until the ULAA witnesses testified at the trial.

In addition, Banker had no idea that she was about to be fired, Banker had never been given a poor or substandard performance evaluation, and Banker had never been disciplined, reprimanded or given any work performance 'write-ups.' At the time of her termination, Banker had even made plans to be at ULAA for the upcoming season and she forewent seeking employment opportunities elsewhere. (TR, 9-14-10 at 10:20-22).

On May 16, 2008, the day following her discharge and prior to the initiation of the instant lawsuit, Banker sent an email to Mann and Hermann stating as follows:

> [t]he timeline of letting me go simply does not add up. If our working together simply 'was not a good fit' as you stated yesterday, then why not let me know in the winter or early spring so I could find another job? With the timing of our meeting **there is no other conclusion but that I am being let go in retaliation for the recent investigation.**

(TR, 9-14-10 at 10:22-28, 2:25-28; Plaintiff's Exhibits 12 and 13; Defendant's Exhibit 3). Coach Mann did not respond to Banker's email. (TR, 9-14-10 at 3:29).

On May 16, 2008, Banker also informed Mann and Hermann as follows:

> I was then and still am shocked at our conversation yesterday. ... it was confirmed that I would be here through next year after I received no notice before April 30th which is required under our contract. ... I had told people that I would be here next year as our contract states, have a lease into next year and have passed on looking for other opportunities ... was given every indication under our contract that I would be here through next year.

(TR, 9-14-10 at 10:22-28, 2:25-28; Plaintiff's Exhibits 12 and 13; Defendant's Exhibit 3).

The Court of Appeals ignored all of this evidence and its opinion failed to address any of the evidence in support of Banker's case.

The evidence did prove that ULAA's reasons for the discharge were pretextual and had no basis in fact. At trial, ULAA conveniently claimed that the decision to discharge Banker had actually been made on April 16, 2008, prior to her April 22nd HR Complaint. ULAA's own email documentation, however, disproved that claim and demonstrated the pretextual nature of ULAA's reasons for firing Banker. In her email dated May 6, 2008, Hermann wrote that the Banker situation "will *likely* result in a non-renewal," and that Hermann "would *recommend* that Ron proceed" with terminating Banker's employment. (TR, 9-15-10 at 11:59-12:01).

In her email dated May 7, 2008, Hermann wrote that "we will proceed to not renew *as early as today*." Hermann's May 7th email also stated that "her grievance will not affect *whatever her current or ongoing employment status is*." (TR, 9-15-10 at 12:01-03). When asked if she had any documentation evidencing the claimed April 16th discharge meeting with Mann, Hermann testified "no, sir, other than the notations in Ron's planner and my planner." ULAA never produced any such notations, documents or planners from either Mann or Hermann. (TR, 9-15-10 at 12:01-03).

Unlike the Court of Appeals, the trial court recognized this evidence of pretext and held as follows:

> **Sufficient facts also emerged at trial to create the inference that ULAA's non-discriminatory reason for termination was a pretext for retaliation**. In additional to the relatively **strong temporal proximity** between the complaint and termination, **delegation of the investigation of the Plaintiff's human resources complaint to Julie Hermann raises the inference that its conclusion was predetermined.**

(Trial Court, Opinion and Order entered July 12, 2011, p. 4).

The trial court also acknowledged the evidence of pretext resulting from the fact that once Hermann learned that Banker had broken rank and gone outside of the Athletic Department to lodge a formal complaint with the University's HR Department, the writing was on the wall as to what was going to happen to Banker's job. When Hermann learned that Banker had made a formal discrimination complaint outside of the Athletic Department, Hermann personally took over the "investigation" herself, which was contrary to standard University procedure directing the HR Department representatives to conduct an investigation, Hermann promptly fired Banker without any regard to how obvious the retaliation would be.

As noted above, Hermann called Banker into her office and even told her that she "should not have gone to HR." Three weeks later, Hermann and ULAA fired Banker and told her only that "it was not a good fit" without giving Banker any performance based reasons for firing her. (TR, 9-14-10 at 10:20-21).

The trial court correctly concluded that this evidence demonstrated pretext and showed that ULAA's reasons for firing Banker had no basis in fact. The trial court analyzed the evidence and held as follows:

> Sufficient facts also emerged at trial to create the inference that **ULAA's non-discriminatory reason for termination was a pretext for retaliation**. ... Additionally, **Ms. Hermann's displeasure that the Plaintiff filed a complaint outside of the athletics department and her doubts about restoring trust with the staff points both to the impending decision to terminate her employment as a direct, but perhaps pragmatic, result of the complaint and to the decision to terminate as far from settled.**

(Trial Court, Opinion and Order entered July 12, 2011, p. 4).

The statements of Hermann in response to Banker's HR complaint that "you should not have gone to HR" was one of many statements constituting direct evidence of a retaliatory intent. Where there is direct evidence of retaliatory intent, the entire *McDonnel Douglas* burden-shifting analysis is not to be utilized and an employee need not prove the prima facie elements set forth therein. Monette v. Electronic Data Sys.Corp., 90 F.3d 1173 (6th Cir. 1999); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

Here, because there was direct evidence of Hermann's retaliatory intent, the Court of Appeals further erred by even deciding the case within the framework of the *McDonnel Douglas* burden-shifting analysis. The burden-shifting analysis is not the proper method of affirming or reversing jury verdicts, but rather, is an antiquated summary judgment analysis that should give way to a more practical and common sense analysis of whether or not an employee was discharged for unlawful retaliatory reasons under the statute.

In any event, Hermann's statements to Banker that (1) 'you should have come to me,' (2) 'I don't know how I'm going to restore trust in you amongst the staff now' and (3) 'I don't know how you're going to work downstairs after this' all constitute evidence of causation and pretext and further demonstrate the simple fact that Hermann and ULAA discharged Banker in retaliation for making her complaints of discrimination.

When coupled with all of the circumstantial evidence leading up to the termination, the only reasonable factual conclusion was that Banker was retaliated against for making her HR complaint.

In addition to all of the direct evidence of retaliation, there was a wealth of circumstantial evidence introduced at trial, including but not limited to the following: (1) Banker was fired less than three (3) weeks after making her HR complaint, (2) ULAA produced no documentation of any claimed poor work performance by Banker, (3) ULAA introduced no documentary evidence that a decision to terminate Banker's employment was made prior to her HR complaint, as ULAA unsuccessfully claimed at trial (in fact the documentary evidence produced by ULAA proved just the opposite) (4) prior to Banker's HR complaint, Hermann sent an email to Banker stating 'we're lucky to

have you,' 'you're a change agent,' 'don't let their limitations take you out of the game,' and 'thank god you're here,' (5) ULAA deliberately withheld and never produced Hermann's email to Banker despite extensive discovery and document production, (6) Banker had no disciplinary warnings, memos or work performance write-ups at any time during her employment with ULAA, (7) at the time of her discharge, Banker had no idea she was about to be fired; to the contrary, Banker had been given every indication prior to her HR complaint that her employment contract was going to be renewed for the following season, (8) ULAA never told Banker why she was being discharged other than 'it was not a good fit,' and (9) Banker's immediate response to being fired was an email to both Hermann and the Head Track and Field Coach Ron Mann stating as follows:

> [t]he timeline of letting me go simply does not add up. If our working together simply 'was not a good fit' as you stated yesterday, then why not let me know in the winter or early spring so I could find another job? With the timing of our meeting there is no other conclusion but that I am being let go in retaliation for the recent investigation.

This is a case where the employer did exactly what the statute prohibits, and the evidence at trial proved it. There was no legitimate reason to reverse the jury's verdict or the judgment of the trial court. Contrary to the opinion of the Court of Appeals, This case could be the new gold-standard in Kentucky for evidence sufficient to sustain a jury verdict on a KRS 344.280 retaliation claim.

B. THE ARGUMENTS RAISED IN THE CROSS-APPEAL SHOULD BE REJECTED

With respect to the issues raised in Appellee's cross appeal, Appellants state that the cross-appeal should be denied because none of the issues raised warrants reversal or even modification of any of the trial Court's rulings.

1. Award of Lost Wages and Mitigation of Damages.

This issue was exhaustively litigated, argued and briefed during the year-long barrage of post-trial motions filed with the trial court. ULAA made these same arguments to the Trial Court, and on December 10, 2010, the Court rejected these arguments holding as follows:

> ...ULAA requests that the Court strike the Plaintiff's lost wages award on the grounds that the Plaintiff did not establish evidence at trial that she mitigated her lost income under a number of cases culminating with *Dollar General Partners v. Upchurch (citations omitted)* ... Contrarily, the Plaintiff cites numerous federal cases analyzing Title VII claims that hold that it is the defendant's burden to offer evidence that a plaintiff is not entitled to lost wages. The prevailing approach of those cases is to hold a plaintiff is presumptively entitled to lost wages when she prevails with a retaliation claim.

(Opinion and Order entered December 10, 2010, pp. 1-2, Appendix B).

In finding that Banker introduced sufficient mitigation evidence to support her lost wages claim, the trial court held as follows:

> ...the Court agrees with the Plaintiff that once she establishes some proof of mitigation, the burden falls on the defendant to negate it, leaving the jury with the decision of how much back-pay to award. *(citing) Lewis v. Bledsoe Surface Min. Co.,* 798 S.W.2d 459, 461 (Ky. 1990). Given the standard in *Lewis, supra,* the Plaintiff presented sufficient evidence for the jury to conclude she sought employment and was able to work.

(Opinion and Order entered December 10, 2010, p. 2, Appendix B).

The Court further addressed the identical arguments made in ULAA's cross-motion as follows:

> At trial, the Parties presented evidence of the Plaintiff's salary amount and the date of her termination. Additionally, the Plaintiff testified that after her termination she sought other employment, but felt it was futile given the hiring season for assistant track and field coaches. When reviewing the proof as a whole, it was reasonable for the jury to infer that the termination, coupled with the pending lawsuit, acted as a virtual scarlet letter, precluding Ms. Banker's employment as a collegiate coach.

(Opinion and Order entered December 10, 2010, pp. 2-3 Appendix B).

Given the trial court's firsthand view of the evidence introduced during the trial, and its specific findings of fact and conclusions of law that correctly applied the governing law this issue, there is nothing to justify disturbing the Court's findings.

2. Award of Emotional Distress Damages.

ULAA next asks this Court to overturn the jury's award of emotional distress damages. ULAA made this same argument to the Trial Court following the jury verdict, and it was correctly rejected.

The trial court found that the jury award of emotional distress damages was both reasonable and not excessive in light of the evidence introduced at trial. The trial court stated as follows:

> Next the Court will consider whether the jury's awarding $300,000 for mental and emotional distress damages is excessive: The amount of damages is a dispute left to the sound discretion of the jury, and its determination should not be set aside merely because we would have reached a different conclusion. If the verdict bears any relationship to the evidence of loss suffered, it is the duty of the trial court and this court not to disturb the jury's assignment of damages. *Childers Oil Co. v. Adkins*, 256 S.W.3d 19,28 (Ky. 2008).

(Opinion and Order entered July 12, 2011, pp. 4-5, Appendix B).

With respect to the actual evidence of record that supported the emotional distress award, the trial court held that:

> During the trial the Plaintiff testified that she lost weight, was embarrassed, felt depressed, and was under extreme stress. Consistent with this testimony, the Plaintiff's mother testified about how important coaching was to the Plaintiff and, accordingly, how "devastating" termination was. Having considered the facts surrounding the Plaintiff's termination, it was reasonable for the jury to conclude that the Plaintiff did indeed suffer from a profound mental and emotional distress. In addition to the embarrassment of being fired for no good cause, the Plaintiff had good reason to worry that termination represented a severe setback on her career track. The verdict bears a relationship to the evidence of loss suffered, and the Court will not disturb the jury's findings.

(Opinion and Order entered July 12, 2011, p 5, Appendix B).

The sufficiency of the evidence to support the emotional distress award was properly decided and this Court should reinstate the judgment of the trial court.

3. Award of Attorney Fees.

The award of attorney fees in this case was a typical and unremarkable application of K.R.S. 344.450, the mandatory prevailing party attorney fee provision of the Kentucky Civil Rights Act. The trial court considered a wealth of proof and argument on this issue, and properly engaged in the *Lodestar* analysis set forth in *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814 (Ky. 1992). The trial court ultimately concluded that a reasonable fee was $149,325.

In reaching its conclusion as to the amount of the attorney fee award, the trial court made several specific underlying determinations, including the following:

> The first issue the Court will address is the reasonableness of Mr. Cassis' $275 hourly rate. ... The Court agrees with the Defendants that the record is scant as to what the prevailing market rate for comparable work in Louisville is. ... The Defendants cite employment cases from various venues around Kentucky that point to attorney fee awards ranging from $200 to $300 per hour. They also assert that their [Defendant's] rate was no higher than $131/hr. per attorney. [Fn] Two attorneys represented the Defendants at trial and made numerous other appearances together, presumably doubling this rather low rate. Further, although Mr. Cassis secured a sizeable jury verdict for his client, the Defendants insinuate that he does not have the experience to demand an hourly rate of more than $175. ...After considering the risk and complexity this case entailed, along with the skill displayed by Mr. Cassis, the Court concludes that $275/hr. is an unreasonably high fee for this case, while $175/hr. is an unreasonably low fee. A reasonable fee is is $220/hr.

(Opinion and Order entered March 1, 2011, pp. 2-3, Appendix B).

The trial court next considered additional *Lodestar* factors in determining a reasonable attorney fee, holding as follows:

> ... the Court will focus on whether Mr. Cassis' tabulation is reasonable in light of the litigation. When dissected, the number of hours Mr. Cassis worked on the case amounts to approximately thirteen and a half fifty-hour workweeks, or roughly five fifty-hour workweeks per year since Ms. Banker's initial interview on June 1, 2008. Although it could be more hours than defense counsel billed, this amount of time is reasonable in light of the contentiousness of the litigation, which included the following: lengthy dispositive motions, multiple discovery disputes, numerous depositions, hearings, client counseling, mediation, a week long jury trial, post-trial motions, post-trial discovery disputes, and this contentious dispute over attorney fees. Thus, the Court concludes that a reasonable "lodestar" figure is $220 multiplied by 678.75, which equals $149,325.

(Opinion and Order entered February 15, 2011, p. 5, Appendix B).

Finally, the trial court declined to make either an upward or a downward adjustment to the *Lodestar* figure, citing and following the standards set forth in *Hill v. Kentucky Lottery Corp.*, 2010 WL 1636870 that the trial courts "should not undertake to adopt some arbitrary proportionate relationship between the amount of the attorney fees and the amount awarded." *Id.* at 14.

(Opinion and Order entered February 15, 2011, pp. 5-6, Appendix B).

Because the trial court considered and correctly decided every legal and factual argument that ULAA now makes in its cross-motion, this Court should not re-decide those same issues again here. The cross-appeal should be denied.

V. CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be reversed, and the jury's verdict and the judgment of the trial court should be reinstated.

Respectfully submitted,

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